LONE STAR STEEL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-284 Decided February 6, 1989

Petition for discretionary review of a decision of Administrative Law Judge Frederick A. Miller affirming the issuance of Notice of Violation No. 85-003-110-001 and imposing a civil penalty of $1,100. TU 5-22-P.

Reversed.

l. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Probability of Occurrence--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Seriousness--Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program--Surface Mining Control and Reclamation Act of 1977: Revegetation: Generally

When OSMRE issues a notice of violation for livestock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i),
and up to 7 points, based upon the extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR 723.13(b)(2)(i), and where other mitigating factors were shown.

APPEARANCES: Virgil D. Medlin, Esq., Oklahoma City, Oklahoma, for peti- tioner; Paulette Andrud, Esq., and Jon K. Johnson, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Lone Star Steel Company (Lone Star) has petitioned for discretion-
ary review of a January 9, 1987, decision by Administrative Law Judge Frederick A. Miller concluding that violation No. 2 of Notice of Violation

(NOV) No. 85-003-110-001 was properly issued, and affirming the civil pen- alty assessed by the Office of Surface Mining Reclamation and Enforcement (OSMRE) for violation No. 2 in the amount of $1,100. On December 6, 1988, we granted the petition in part. Finding that there was no error in the Administrative Law Judge's determination that the NOV was properly issued, we narrowed the issue under review to the propriety of the amount of the civil penalty assessed. The parties have filed briefs pursuant to 43 CFR 4.1273, and the matter is now ripe for decision.

Our finding that the NOV was properly issued under the circumstances of this appeal relied upon the holding in Lone Star Steel Co. v. OSMRE, 98 IBLA 56 (1987), a similar but not identical appeal also brought by Lone Star. In that case and this, Lone Star was cited for violation of 30 CFR 715.20(e)(2), which prohibits grazing cattle on reclaimed minesites before the revegetated area is ready for such use. In Lone Star Steel Co., supra, we found the NOV had properly issued, even though Lone Star showed it had fenced the reclaimed minesite and had taken other measures to pre-vent cattle owned by neighboring farmers from grazing the area. Therein we stated:

> The regulation at 30 CFR 715.20(e)(2) requires that no grazing take place without the approval of the regulatory authority. When grazing takes place prior to such approval, a violation exists. If as a result of that violation, Lone Star were liable for a certain civil penalty which could not be mitigated, one could conclude that strict or absolute liability obtained. Such is not the case. All the facts surrounding Lone Star's attempts to keep cattle from grazing on the permit area are appropriate for consideration as mitigating factors in determining the amount of the civil penalty. They are not, however, relevant to whether or not there was, in fact, a violation of the regulations. [Footnote omitted.]

Id. at 62.

This case is before us on a record consisting of a joint stipulation by counsel, answers to interrogatories, affidavits, and briefs filed by the parties. 1/ The record establishes that the reclaimed Lone Star minesite had been revegetated and fenced to keep cattle out until the plants were established. The fence remained intact even though 20-25 head of cattle were found grazing on the immature vegetation by an OSMRE inspector. The cattle would have had access to about 100 acres of revegetated land at the location where they were found.

1/ The facts of the dispute appear in large part in OSMRE's "Response to Petitioner's Interrogatories, Request for Production of Documents and Request for Admission," filed with the Administrative Law Judge on Oct. 21, 1985. For simplicity, we shall refer to this document as "Interrogatories," specifying the page number where relevant material appears.

Answer to interrogatory No. 10 establishes that "[t]he damage done to the vegetation at the time of the inspection was minimal; however, the cattle nearly destroyed the temporary repair work near the county drainage system" (Interrogatories at 4). As indicated in the NOV, the "temporary repair work" mentioned by the interrogatory consisted of bales of hay placed to prevent erosion. Not all the hay was consumed (Interrogatories at 10). The violation was terminated on March 15, 1985 (Interrogatories at 5). Although it thus appears that the cattle were removed from the mine-site within the time allowed by the NOV for abatement, it is not clear exactly when they were removed.

A civil penalty was assessed by the Administrative Law Judge using the point system established by 30 CFR 723.13(b), establishing four crite- ria: history of previous violations, seriousness, negligence, and good faith. No points were assessed for history of previous violations, and neither party challenges this determination by the Administrative Law Judge. The "seriousness" portion of the penalty is divided by the regulation into two parts: probability of occurrence and extent of damage. Lone Star was assessed 12 points for "probability" and 7 points for "damage" (Interrogatories at 5). Lone Star argues that point assessments for the two elements of "seriousness" should be reduced because the probability of revegetation failure or erosion because of the minimal damage done by the trespassing cattle is insignificant.

OSMRE assessed 12 penalty points for "negligence." Lone Star argues that it had constructed a fence which remained in good repair at the time the cattle were found on the site, and that the cattle were not placed on the land by Lone Star, which had no cattle of its own. Lone Star states that no act by Lone Star contributed to the presence of the cattle in the prohibited area, and denies it was negligent in any way so as to contribute to the premature entry of the cattle. OSMRE did not award Lone Star any credit points for its good faith in abating the violation.

[1] In Lone Star Steel Co., supra, we explained that an uncritical application of 30 CFR 723.13(b)(2), governing the two "seriousness" crite- ria, may lead to error, because the phrase "probability of occurrence" must be interpreted with the purpose of the regulation in mind. The pur-pose of the regulation is to prevent loss of vegetation. Id. at 65. As the Lone Star Steel Co. decision explained, the probability and extent of damage must be assessed in consideration of the "events which the grazing prohibition * * * is designed to prevent." Id. at 66. This means that we must consider the circumstances surrounding the observed violation to deter-mine whether, in the instant appeal, probability of revegetation failure was "likely," as the Administrative Law Judge found.

Ruling on this aspect of the question of seriousness, the Administra- tive Law Judge explained why he upheld OSMRE's assessment of 12 points: "Petitioner [Lone Star] was assigned twelve (12) points which means that the occurrence will 'likely' happen. The regulation is designed to prevent the destruction of revegetation, and since destruction of vegetation had already

occurred the twelve (12) point assignment is appropriate" ((Decision at 3). This finding, however, overlooks the fact stipulated to by the parties that damage caused to revegetation by the cows was "minimal." The fact-finder fell into the error described by our earlier Lone Star Steel Co. decision, and equated the occurrence of a violation with a consideration of the cir- cumstances surrounding the occurrence.

While it is clear that the violation took place, it is also clear that minimal damage was done to revegetation. This being the case, it was error to assume that the probability of revegetation failure was "likely." In fact, because the record agreed upon by the parties establishes that damage to the vegetation was "minimal," the proper finding was that such probabil- ity was "insignificant." 43 CFR 723.13(b)(2)(i).

In this case, as in Lone Star Steel Co., the violation occurred when reclamation was nearly complete. Like the situation in Lone Star Steel Co., the entire permit area was fenced, but, as we found in Lone Star Steel Co., the cattle had apparently been placed on the reclaimed land by a farmer. Under these circumstances, we concluded that the progress of revegetation and the manner in which Lone Star had supervised the permit area made the probability of failure slight, and we reduced the penalty points assigned therefore to one. Id. at 67. In the instant case, it appears that Lone Star had maintained fences but was not as diligent in keeping watch for trespassing cattle as it had been in the earlier case. Accordingly, we reduce the points to four, the highest number of points allowable under
the "insignificant" category, because the known facts indicate that prob-able damage to the vegetation was insignificant, although Lone Star did not demonstrate the same degree of diligence in preventing entry of the cattle as it had in Lone Star Steel Co.

For the "extent of damage" caused by the violation, the Administrative Law Judge approved the assessment of seven points, the maximum allowed by the regulation for violations where damage is confined to the permit area. See 30 CFR 723.13(b)(2)(ii)(A). Nonetheless, the record establishes that damage done to the revegetation was minimal, in part owing to the fact that the cattle had eaten hay placed on the land to prevent erosion. Lone Star argues that the consumption of hay should not be considered to constitute "grazing," because the hay was not "growing grass or herbage" and because destruction of the hay did not affect the regulatory purpose which was
to prevent failure to revegetate (Petitioner's Brief at 3, emphasis in original). This argument is unconvincing, however, since complete removal of the hay could have caused erosion of the reclaimed land (Interrogatories at 3, 4). Considering, therefore, that there had been damage to hay used to check erosion on the minesite as well as minimal damage to growing plants, we conclude that seven points was properly assessed for extent of damage.

Twelve points were assessed by OSMRE for "negligence". This is
the greatest assessment that can be made for negligence. 30 CFR 723.13(b)(3)(i)(B). The Administrative Law Judge affirmed this assessment because "the permittee had failed to keep cattle off the site" (Decision at 3). Such a finding misapplies the definition of "negligence" supplied

by the regulation, which is that "[n]egligence" means the failure of a per- mittee to prevent the occurrence of any violation * * * due to indifference, lack of diligence, or lack of reasonable care." 30 CFR 723.13(b)(3)(ii)(B). As construed by the Administrative Law Judge, only the first clause of the quoted sentence is given effect.

If, as the manner in which this rule was applied indicates, the defini-tion of negligence is that a violation occurred, then the provision of the regulation which recognizes that a violation could occur without negligence could never be applied. Clearly, the regulation is designed to recognize degrees of fault in causation, since it provides that causes for violations ranging from inadvertence, through negligence, to intentional conduct are possible. Because each category of fault allows for assessment of a varying number of points, each category is designed to allow the exercise of discre-tion by the Department. Thus, if no negligence can be said to exist, but a violation nonetheless has occurred, no points at all are assessed. 30 CFR 723.13(b)(3)(i)(A). If there has been some act of indifference or lack of diligence or reasonable care which has contributed to the violation, then
up to 12 points may be assessed. 30 CFR 723.13(b)(3)(i)(B). The fact that a violation occurred does not, by itself, require the maximum point assess- ment for negligence. Consequently, the finding that occurrence of a viola- tion justified imposition of the maximum number of points for negligence
was error and must be reversed.

The finding by the Administrative Law Judge that there was no evidence of attempts to control cattle overlooked evidence that Lone Star had main- tained a fence around the revegetated area for that purpose. It had not, however, locked the fence gate, and since it did not maintain constant watch over the site it was foreseeable that cattle might be let into the property by others. Apparently this is what happened. While the failure to lock
the gate may be properly characterized as a neglect, it does not warrant
the maximum assessment possible, for such a finding would allow no credit whatever for the construction and maintenance of a satisfactory fence. Considering the efforts which Lone Star had spent to prevent grazing, we find it reasonable to assess six points for the failure to lock the fence gate.

The final point assessment category considered by OSMRE and the Admin- istrative Law Judge concerned "good faith," a condition indicated by the speed with which the permittee abates a violation. On the record before
us, there is no showing that Lone Star abated the violation early. It is clear, although Lone Star now seems to argue otherwise, that the violation terminated on March 15, 1985, the date set by the NOV for abatement. The Administrative Law Judge so found, and concluded correctly that no points for good faith could be allowed for rapid compliance under the regulation, citing 30 CFR 723.13(b)(4)(ii), because Lone Star had merely done what was required under the circumstances. This ruling was correct. Lone Star's argument to the contrary lacks support in the record.

Our calculation of points to be assessed using the regulatory system indicates that less than 30 points should have been assessed for the vio- lation under the agreed circumstances. Assessing the penalty according

to the number of points arrived at by our evaluation of this case results in a penalty of $340. The errors made in the calculation of points to be assessed concealed the fact that waiver of penalty was an alternative, since under provision of 30 CFR 723.12(c) an election may be made whether to impose a civil penalty for a violation cited in an NOV when fewer than 30 penalty points are assigned, provided no cessation order has issued. Lone Star Steel Co., supra at 67; see Mud Fork Coal Corp. 5 IBSMA 44, 56-58, 90 I.D. 181, 187-88 (1983). We find, accordingly, that waiver is properly made in this case, on the facts as stated in the opinion, where only 17 penalty points were properly assessed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Administrative Law Judge's assessment of a total of 31 penalty points and the related assessment of $1,100 is reversed, and payment of penalty is waived. The penalty paid by Lone Star pending appeal shall be refunded.

Franklin D. Arness
Administrative Judge

I concur:

David L. Hughes
Administrative Judge